Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

HEIRS OF H.P. GUERRA, DECEASED,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The claim is for the unlawful taking of Petitioners' mineral estate. To construct a dam and water reservoir on the border with Mexico, the Government condemned Guerra's lands, including the minerals, located in Starr County, Texas. Concluding that a taking of the mineral fee was not necessary for the protection of the reservoir, the Government revested the minerals to all of its condemnees in adjacent Zapata County. However, it refused to revest the Guerras' minerals under the reservoir, representing that it needed the minerals to "prevent drilling." In a reversal of policy years later, the Government secretly leased the minerals and allowed commercial development of the reservoir for its own profit. The questions are:

1. Whether a condemnation of minerals – unnecessary to the public purpose – can be vacated on equal protection grounds where the Government elects to revest the minerals to all landowners except one.

2. Whether the disparate treatment of equally situated landowners in the same reservoir project is justified simply because separate condemnations were filed in adjoining judicial divisions of the district court.

3. Whether the arbitrary taking and commercial use of Guerra's minerals constitutes such a grave miscarriage of justice as to allow an "independent action" for vacating the judgment of condemnation.

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are styled as "Heirs of H. P. Guerra, deceased," and presently consist of J. C. Guerra, Margarita G. Salinas; H. P. Guerra, III; Hector F. Guerra; Richard L. Guerra; Rose Marie G. Rodriguez; Ruben R. Guerra, Jr.; W. T. Guerra; Rose Theresa G. Massey; Kati M. Guerra; James C. Guerra; Patrick M. Guerra; David N. Guerra, Trustee of the Estates of Jacquelyn I. G. Narro and Barbara M. Guerra; Cecilia G. McAuliff; Heron A. Guerra; Luis A. Guerra; Dennis D. Guerra; Rosalinda G. Guerra, Trustee of the Virgil H. Guerra, Jr. Trust, these Petitioners are all individuals and have no corporate affiliations; and the First State Bank and Trust Company of Mission, Texas, Trustee of the Estate of James Jeffries, Jr.; their heirs, legal representatives, executors, successors and assigns. (*See* Final Summary Judgment at 4, App. D.) Petitioners were plaintiffs in the district court and appellees in the court of appeals.

Respondent

Respondent is the United States of America, which was defendant in the district court and appellant in the court of appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTION AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

A. Factual Background of the Case 3

B. The Course of Proceedings 6

REASONS FOR GRANTING THE PETITION 10

A. The Appellate Court Disregarded the Fundamental Property Rights of the Guerras in Reversing the Judgment Based on Due Process and Equal Protection Violations 10

B. The United States Acted Arbitrarily Taking Guerra's Oil and Gas Estate to Prohibit Drilling While it Took Only Nondrilling Easements from all Other Similarly Situated Owners 15

C. The Condemnation Law Principle That the Validity of a Taking is Viewed According to the Facts Existing at the Time of Taking Has Been Erroneously Applied 17

D. Independent Action Provides Jurisdiction to Vacate Judgment of Condemnation Where There is a Grave Miscarriage of Justice 21

CONCLUSION 23

APPENDIX

Appendix A
Opinion, Fifth Circuit Court of Appeals (March 28, 2000) 1a

Appendix B
Final Judgment (District Court) (June 26, 2000) 11a

Appendix C
Order of District Court Judge Vela (November 12, 1996) 12a

Appendix D
[Order] On Petition for Rehearing, Fifth Circuit Court of Appeals (June 6, 2000) 15a

Appendix E
Final Summary Judgment, District Court (July 15, 1998) 17a

Appendix F
Magistrate Judge's Report and Recommendation (July 24, 1996) 26a

Appendix G
Constitutional and Statutory provisions 40a

Appendix H
Map of Guerra's condemned lands 43a

TABLE OF AUTHORITIES

CASES **Page**

Baker v. Carr,
369 U.S. 186 (1962) 14

Catlin v. United States,
324 U.S. 229 (1945) 12, 18, 20

Donatelli v. Mitchell,
2 F.3d 508 (3rd Cir. 1993) 11

Hawaii Housing Authority v. Midkiff,
467 U.S. 229, 245 (1984) 22

Hazel-Atlas Glass Co. v. Hartford-Empire Co.,
322 U.S. 238 (1944) 22

Heirs of Guerra v. United States,
207 F.3d 763 (5th Cir. 2000) . . . . . *passim*

Heller v. Do by Do,
509 U.S. 312 (1993) 11

Hill v. Roberts,
793 F. Supp. 1044 (D. Kan. 1992) 14

Hooper v. Bernalillio County Assessor,
472 U.S. 612 (1985) 14

Myers v. Ylst,
897 F.2d 417 (9th Cir.) *cert. denied*,
498 U.S. 879 (1990) 14

Poe v. Ullman,
367 U.S. 497 (1961) 13

Richard v. Hinson,
70 F.3d 415 (5th Cir. 1995) 11

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973) 7, 11, 12, 17

United States v. Beggerly,
524 U.S. 38 (1998) 3, 21, 22

Weldon v. United States,
70 F.3d 1 (2nd Cir. 1995) 7

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 15

CONSTITUTION

U.S. Const. amend. V . . . . . *passim*

STATUTES AND RULES

22 U.S.C. § 277 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2409 (Quiet Title Act) 2, 11

40 U.S.C. § 258 (Declaration of Taking Act) 11, 13

Fed R. Civ. P. 60(b)(3) 22

Fed R. Civ. P. 60(b)(4) 2-3, 7, 22

No. _____

IN THE

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HEIRS OF H. P. GUERRA, DECEASED,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Heirs of H. P. Guerra, deceased, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-10a) is reported at 207 F.3d 763. The Magistrate Judge's Report and Recommendation (App. F, 26a-39a) is unreported. The district court's order denying the Government's motion to

dismiss and granting the plaintiffs' motion for summary judgment (App. C, 12a-14a) is unreported. The district court's Final Summary Judgment for plaintiffs (App. B, 11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2000. That court denied a petition for rehearing on June 6, 2000. (See App. D, 15a-16a) The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES INVOLVED

Reprinted in the appendix to this petition (App. G, 40a-42a) are relevant provisions of the Fifth Amendment, Quiet Title Act, Declaration of Takings Act, and FED. R. CIV. P. 60(b).

STATEMENT OF THE CASE

This case involves important public issues of the unconstitutional taking by the Government of Guerra's mineral estate, without a valid public purpose, and its use and conversion by the Government for profit. The petitioners brought suit in the district court to recover the mineral estate in 1,778 acres of land in Starr County, Texas taken through condemnation proceedings. They alleged violations of the Public Use, Due Process and Equal Protection requirements of the Fifth Amendment of the U. S. Constitution which rendered the original judgment of condemnation void. Jurisdiction of the district court is predicated on 28 U.S.C. § 2409a (the Quiet Title Act); FED. R. CIV. P. 60(b)(4)

(Court may relieve party from a void judgment), and the doctrine of "independent action." *See United States v. Beggerly*, 524 U.S. 38, 45-46 (1998) (Independent action brought in the same court requires no independent basis for jurisdiction.)

A. Factual Background of the Case.

The Falcon Dam and Reservoir was a joint project of the United States and Mexico on the lower Rio Grande River. *See* 22 U.S.C. § 277, *et. seq.* According to plan the Government took adjoining lands in Zapata County and Starr County Texas, abutting on the river. The dam was placed at the South end of the reservoir in Starr county, fronted by a 2,300' wide strip designated the "Operations/Restricted" Area. (See map, App. H) All of the lands condemned for the reservoir in Starr County belonged to H. P. Guerra. Most of the lands covered by the reservoir lie to the north in Zapata County.

The area covered by the project was prospective for oil and gas production and, hence, from the earliest time the Government gave consideration to a plan to save the minerals for the private owners while protecting the reservoir from harmful drilling. Starting first with the Starr County lands, the Government in December 1948 filed a Petition in Condemnation of 4,908.89 acres of land owned by H. P. Guerra, followed by a Declaration of Taking of the "full fee simple title."[1] (R. 169) The value of the land and minerals

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[1] The condemning authority was the International Boundary and Water Commission, (hereafter "IBWC") which had authority to build and operate the dam and reservoir for the United States. The Secretary of State carried out the treaty mandates, *See* 22 U.S.C. § 277d-1, and the Bureau of Land Management executed the leasing

was disputed and eventually a "stipulated judgment" was entered in 1955. (R. 138) Guerra's lands included all property in Starr County, including the dam and restricted areas. (*See* map, App. H) H. P. Guerra had already granted leases on the land, and argued strongly to retain his minerals. While stating that the Government "neither wants nor intends to use the minerals," Government representatives consistently told Guerra that his minerals were needed "to prevent drilling." Because the Zapata County land, adjoining Guerra's lands north of the county line, lay in the Laredo division of the Southern District of Texas, a separate condemnation was filed in that court. On December 16, 1949, the Secretary of State wrote the Attorney General requesting the condemnation of the Zapata County land and recited the policy regarding minerals: owners would be allowed to retain their minerals, except that directional drilling only would be permitted on lands lying below 325' elevation (i.e., the areas covered by water). Pursuant to this policy the IBWC from 1952 to 1956 revested the minerals to all Zapata County landowners by amended judgments, and retained only a "negative easement" prohibiting the drilling in the reservoir. (*See e.g.*, Stipulations and Final Judgments, R. 347).

While the Zapata County landowners were advised of this policy and were awarded its benefits, H. P. Guerra was never offered the option to retain his minerals. Despite numerous requests for revestment the IBWC refused Guerra and his heirs, always representing that it was necessary to hold his minerals "to prevent drilling." In 1956, the Secretary of State confirmed with the IBWC by correspondence the same oil and gas policy in ". . . the initial taking of lands for Falcon reservoir," and that thereafter, "the

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of public lands.

owners were to have the option of retaining their oil and gas rights, subject to the negative easement." (R. 622) The "Operations/Restricted" zone – a strip 2,300' wide in front of the dam – was taken in fee and was never intended to be subject to drilling for oil and gas. Petitioners have never contested the public necessity for taking both surface and minerals in the Restricted Area. However, the Government retained the minerals in 1,778 acres lying under the reservoir north of the Restricted Area, all condemned from Guerra (the property here in dispute). The only apparent reason for classifying the lands differently is geographic and artificial: those owners with lands north of the Starr/Zapata County line were favored with revestment; those south of the line (the Guerras) were not. As can be seen on the map (App. H), the line separates landowners across the reservoir, and bisects the land peninsula known as the State Park Tract. There can be no valid explanation – except irrational and arbitrary treatment – where Guerra's land actually abuts that of the Zapata landowners and an artificial county line is the only separation between them.[2]

As late as May and July 1981, the IBWC again denied requests from the Guerras for revesting the minerals and denied a lease applicant a lease, stating that drilling would not be permitted "in the near vicinity of the dam." (*See e.g.*, letter dated May 9, 1981, R. 534) However, these representations quickly proved false. A lease application for the State Park tract was received in June 1981 and accepted on November 12, 1981. This lease was concealed and not placed on public record until July 1991 – some 10 years later

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[2] For example, Edward Yzaguerri owned the northern tip of the State Park Tract and his minerals were revested to him; H. P. Guerra owned the south part of the same State Park Tract and his minerals were not revested.

when drilling was about to commence. This is to be contrasted with the fact that the Government never had a public use of the mineral estate underlying the reservoir when condemnation began in 1949. It acknowledged this fact in the amended judgments revesting the minerals to all Zapata County landowners.

In 1992, the heirs of H. P. Guerra observed drilling rigs operating over their former lands. This surprising event led to the discovery of the unrecorded Government leases for oil and gas, and the correspondence and memoranda describing the policy allowing all Falcon landowners, except H. P. Guerra, the use of their own minerals. The reservoir area proved to rest over a prolific gas field where gas production continues to this day. From 1981 to 1986, the Government executed five oil and gas leases of Guerras' lands underlying both the reservoir and the dry-land areas north of the dam which thus far have paid the Government over $72 million in royalties through 1998.

B. The Course of Proceedings

Acting on these discoveries, the Heirs of Guerra filed suit in the district court alleging, *inter alia,* that the mineral estate was arbitrarily taken and without public purpose, and that such taking without revesting the minerals was invidious discrimination in violation of their due process and equal protection rights under the Fifth Amendment. The district court, adopting the recommendation of the Magistrate Judge, granted final summary judgment to the plaintiffs, and denied the Government's motion to dismiss, or alternatively, motion for summary judgment. (App. E, 17a-25a) In the final judgment the trial court voided the condemnation judgment, reinstated the mineral estate to the Guerras and awarded restitution of the past royalties. (*Id.*)

On appeal by the Government, a panel of the Fifth Circuit reversed, and granted the Government's motion for summary judgment. (App. A, 1a-10a) In its opinion the appellate court ruled that the heirs' claims could not be brought under the Quiet Title Act (the "QTA") because the action was barred by *res judicata*. *Heirs of Guerra v. United States,* 207 F.3d 763, 767 (5th Cir. 2000). Secondly, the court found that FED. R. CIV. P. 60(b)(4)[3] did not provide the jurisdictional basis to declare the condemnation void, because there was a valid public purpose for the original taking, and there was no equal protection violation by treating Guerra differently from the Zapata County landowners. *Id.* 768. While the court did not write on the independent action theory it presumably found that this was not a case of "gross injustice" which would invoke the doctrine.

On the first point the court overlooked the fact that Petitioners' claims essentially are a direct attack on the judgment of condemnation, to which *res judicata* does not apply. *Weldon v. United States*, 70 F.3d 1, 5 (2nd Cir. 1995). On the key equal protection claim, the court grossly misstated the standard for reviewing the discrimination involved. It said, "Even assuming that the government's actions did classify the two groups differently, the classification involves no suspect class and thus need only bear a rational relation to a legitimate governmental purpose." 207 F.3d at 768. The court thus totally ignored, and failed even to discuss, the strict scrutiny review required when a fundamental right is at issue such as an unconstitutional taking of private property. *See, San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973). Saying that these egregious Government actions seem only "inequitable," the court concludes that even the

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[3] The court mentioned only rule 60(b)(6) and did not discuss rule 60(b)(4) – where judgment is void.

allegation of equal protection violation "cannot overcome the deference courts owe governmental bodies to accomplish legislative ends. The acts of which the Guerras complain are thus not ours to remedy." 207 F.3d at 768. Applying the minimum test, the court easily upheld the Government's selective conduct as acts of rational discretion. The constitution, however, does not leave the courts powerless to remedy the arbitrary taking - and commercial use - of Guerra's private property.

The court's analysis also contradicts the undisputed facts. "[It] was not irrational to refuse to make the Zapata county policy retroactively available to Starr County landowners," the court said. *Id.* 768. The truth is that all lands for the reservoir in both counties were condemned in like form. The Government took the entire fee in all land acquired. When it decided to revest the Zapata County minerals, it did so by stipulating to amended judgments filed from 1952 through 1956, each of which were retroactive to the original taking. Hence, those judgments retroactively benefitted the Zapata landowners, and Guerra's judgment not being finalized until 1955, there was no legal reason why his judgment could not have been similarly amended so as to except the taking of minerals.

The earliest map of the project prepared in 1948 set aside a 2,300' strip in front of the dam as the "Operations/Restricted Area." (*See* map, App. H) It was conceded by all that the Restricted Area would require the entire fee as a protection to the dam and structures associated with operations. That area "in the vicinity of the dam" was repeatedly referred to by government agents as the exception to the mineral revestment policy. (*See* letter dated May 15, 1953 from Secretary of State to H. J. Porter.) Having surrendered the lands for the Operations/Restrictions purposes

– making no contest of its use and necessity – Guerra was left with over 1,778 acres of land and minerals similarly situated as, and directly adjacent to, the Zapata landowners. (*See* map, App. H)

The Government's appellate attorney attempted to distinguish Zapata County lands on the basis of "specific hydrogeologic conditions" (*See* Gov't Open. Brief at 10; 26) The court picked up this term and used it in attempting to explain the uniqueness of the Zapata county lands. 207 F.3d at 766. However, the term "hydrogeologic" is unknown to this record; it is neither cited or explained in the record. It is a mythical term created *on appeal* to attempt to justify some physical distinction between Zapata and Starr County lands which does not exist. The only condition cited in the Secretary's letter requesting the Zapata County condemnations was that the oil and gas estates would be left with the landowners if their land "is of sufficient size."[4]

Another tendered justification is found in the Government's brief in the trial court. (*See* Objections to the Magistrate Judge's Report and Recommendations.) There it is said that the mineral policy was not concealed from Guerra and was a policy which applied only to Zapata County landowners. (*Id.* at 3 *et. seq.*) While this argument is intended to rebut the claim of deceit on the part of government agents, it is a complete affirmation that the agents settled upon a classification between landowners in which Guerra was treated differently. This was allowable, it is said, because separate condemnation petitions were filed in separate

[4] Taking of the land above 325' elevation would except the oil and gas; land lying below 325' would be granted an "exception" permitting owners to retain the minerals and to drill directionally from above the 325' line. The water line was later reduced to 307'.

divisions of the Southern District of Texas: Guerra in the Brownsville Division, Zapata landowners in the Laredo division. The Fifth Circuit also picks up the theme of "separate stages of condemnation." 207 F.3d at 768. But that is irrelevant to the constitutional issue of classification. This was a single project, conducted under a single statutory authorization and purpose. The mere accident that the county line dividing landowners required separate petitions in condemnation to be filed in different courts did not justify the grossly disparate treatment of Petitioners.

In short, the appellate court erred in the holdings it chose to make, and totally ignored the standard of strict scrutiny, required when a fundamental right is impaired.

REASONS FOR GRANTING THE PETITION

A. The Appellate Court Disregarded the Fundamental Property Rights of the Guerras in Reversing the Judgment Based on Due Process and Equal Protection Violations

The Fifth Circuit says that conduct that allows the Government to take private minerals and convert them to its immense profit is merely inequitable, and does not make a constitutional injury. 207 F.3d at 768. Unaddressed, however, is the deprivation of property without due process of law, a fundamental constitutional right demanding the standard of strict scrutiny and which provides the Guerras a remedy.

The lower court has written out of the law the equal protection standard predicated upon violation of a

fundamental right. This appellate court did not even follow its own precedent which it cited in settling upon the "rational relation" test. *Id.* at 768 (citing *Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995)). Clearly, its approach is contrary to the settled law of this Court, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973), and other circuit courts as well. *See e.g. Donatelli v. Mitchell*, 2 F.3d 508, 512 (3rd Cir. 1993) (The first step is to determine appropriate standard of review.). Hence, the Guerra's constitutional remedy for an equal protection violation was doomed by a misapplication of the standard for review. It is established law that an equal protection claim is evaluated only after determination of the proper standard of review. *Strict scrutiny* of the classification is required if it "operates to the disadvantage of a suspect class or impinges upon a fundamental right explicitly or implicitly protected by the constitution." *Rodriguez*, 411 U.S. at 17. Otherwise, the classification need only bear a "rational relation" to a legitimate governmental purpose. *Id.; Richard*, 70 F.3d at 417. A complete compendium of the "rational relationship" test and its effect is found in *Heller v. Do by Do*, 509 U.S. 312, 319-25 (1993).

The fundamental right here infringed is the right of a private property owner to not be deprived of his property without due process of law, explicitly protected under the Fifth Amendment. Petitioners have never claimed to be members of a suspect class. The Government argues that it acquired full title to the land and minerals at the time of condemnation under the Declaration of Taking Act, 40 U.S.C., § 258a, which title is impervious from attack under Quiet Title Act, 28 U.S.C. § 2409a. Whether that is true or not as a matter of title law, this petition presses the claim of deprivation of due process and equal protection violations under the Fifth Amendment. If established, the constitutional remedies will override the procedural effects of the

Declaration of Taking Act. *See Catlin v. United States*, 324 U.S. 229, 241 (1945). The core issue therefore is not whether *record title* favors the Government, but whether there is involved a fundamental right impinged upon by the confiscation of private property. If so, strict scrutiny is the standard to measure the validity of the Government's classification between Guerra and the Zapata landowners.

"Strict scrutiny" has a strong meaning which often influences the result of the analysis. It means here that Government action (1) is not entitled to the usual presumption of validity, (2) that the Government rather than complainants must carry a "heavy burden of justification," (3) that the Government must demonstrate that its mineral policies are "tailored" narrowly to serve legitimate objectives, and (4) that it has selected less drastic means for effectuating its objectives. *See Rodriguez*, 411 U.S. at 16-17 (Stating standards of review and the meaning of strict scrutiny.) The Government, on this record, cannot carry "the heavy burden of justification" for the arbitrary classification which deprived Guerra of his minerals. It did not offer Guerra the mineral policy enjoyed by the Zapata owners. Instead, it falsely insisted that it had to keep his minerals "to prevent drilling" and falsely placed all Guerra's land into a restricted classification in which drilling would be prohibited. Rather than a *tailored* policy, it was a *heavy-handed* policy which refused to recognize the difference between the Operations/ Restricted area where the dam was located and the 1,778 acres of Guerra's land adjoining the counties' dividing line. The less drastic means of controlling drilling by negative easements – granted to Zapata landowners – was rejected in Guerra's case and the full fee simple title was taken instead. Thus, every fact satisfies the markers of strict scrutiny determination and points to unlawful discrimination. An analysis such as this is necessary to put flesh on the otherwise

bare bones of equal protection guarantees, and the Fifth Circuit failed to perform it.

Sometimes this court has divided on how explicit the constitutional guarantee must be in order to trigger the standard of strict scrutiny. Mr. Justice Harlan once suggested that the "full scope of liberty" is found in a "rational continuum" of all the specific constitutional guarantees. He lists "the taking of property, the freedom of speech, press and religion . . ." and other such rights as examples of interests that "require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). That the "taking of property" is placed in the same protected category of personal rights such as freedom of speech and religion, is persuasive authority that the issues here involve fundamental rights derived from the constitution.

The government argument, repeated by the lower court (207 F.3d at 768), that it was not irrational to refuse to make the Zapata County policy *retroactively* available to Starr County landowners, is totally without merit. Any inference that an amendment of Guerra's judgment like the Zapata County amended judgments would involve an unusual, unlawful or untimely procedure is false. In truth, all Zapata County amended judgments came years after the original takings and judgments condemning fee simple titles. However, the law authorizes the Attorney General to stipulate for the exclusion of any property interest already taken in condemnation. *See* 40 U.S.C. § 258f (App. G, 40a-42a). The amended judgments therefore operated retroactively to *set aside* the original judgments of condemnation, to *exclude* the oil and gas estate and to *revest* it in the Zapata County landowners. They also added the negative easements which allowed only directional drilling. Therefore, what the

Government granted *retroactively* to the Zapata owners was denied to Guerra. When the earliest protest was made by Guerra and other interested parties, the IBWC Commissioner correctly responded that any revestment would require an amended judgment. (*See* letter March 7, 1949, R. 611.) That very procedural step was taken retroactively to benefit the Zapata landowners, but not Guerra. It has been held that the Equal Protection Clause prohibits the Government from affording one person the retroactive benefit of a court ruling and denying it to another. *See Myers v. Ylst*, 897 F.2d 417, 421 (9th Cir.), *cert. denied*, 498 U.S. 879 (1990); *Hill v. Roberts*, 793 F. Supp. 1044, 1046 (D. Kan. 1992).

Moreover, when a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Hooper v. Bernalillio County Assessor*, 472 U.S. 612, 618 (1985) (Tax exemption scheme which applied to different classes of veterans violated equal protection.) Similarly, this court in *Baker v. Carr*, 369 U.S. 186, 228 (1962), held that a state apportionment statute deprived voters of equal protection, which was a justiciable claim. It was said that courts have always been open to determine that a discrimination may reflect not policy, but simply "arbitrary and capricious action." *Id.* at 226. Here the Government argues that its mineral easement policy applied only to Zapata County but not to Starr County. Perhaps *Baker* suggests the most apt criticism of that policy: the refusal to return Guerra's minerals may not actually reflect a flawed policy of the Executive Branch, but simply an *arbitrary and capricious action*. Certainly that is the case here. In an early decision this court spoke of the constitutional importance of fair administration of our laws:

> Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886). Here, Guerra's minerals were indeed taken by an "evil eye" and "unequal hand." By whatever name, the Guerras' personal and fundamental property rights have been impinged. The Guerras were denied equal protection of the law and the appellate court erred in reversing judgment on that ground.

B. The United States Acted Arbitrarily Taking Guerra's Oil and Gas Estate to Prohibit Drilling While it Took Only Nondrilling Easements from all Other Similarly Situated Owners.

The unequal treatment is undisputed. The appellate court held that it was rational and is excused because: (1) Guerra's land was taken first, eleven months before the remaining Zapata County lands were taken, and before the Government had thought of obtaining only nondrilling easements by which to prohibit drilling; (2) Guerra's land was acquired in a different condemnation suit in a different Federal District Court; and (3) the United States' policy to obtain only nondrilling easements was conditioned upon certain – but unspecified – "hydrogeological conditions" that Guerra's land could not meet.

These reasons found by the court below in approving the exclusion of Guerra's land from the benefit of the Government's mineral easement policy are each mistaken. Whether the United States, when it acquired Guerra's land, had yet perceived its plan to take only easements is irrelevant to the core issue. The invidious discrimination continued long after the taking. It is contended that Guerra's land was validly taken in full fee simple title on January 4, 1949. In December, 1949, in a separate action, the remaining lands required for the reservoir were also taken in full fee simple titles. At that time, *all* of the lands required for the reservoir were the property of the United States in full fee simple title.

Two years and eight months later, irrespective of when it decided to do so, the United States began obtaining amended judgments of taking under its plan to revest the prior owners their oil and gas estates. The Government's denial to Guerra of a like opportunity to elect, as the other owners, to accept the Government's nondrilling easement through an amended judgment of taking, permitting him to retain his oil and gas estate, was the discriminatory conduct. No retroactive application of its plan was required for the United States to have included Guerra as a participant. He was excluded from the plan without rational purpose. This was the invidious discrimination.

The United States used the boundary between the two Texas counties as its intended line of demarcation in the decision to take mineral estates, or to take only nondrilling easements. If a political boundary between counties can provide a valid distinction permitting such disparate treatment, and if separate condemnation proceedings for land lying in adjoining counties can excuse such disparate treatment, constitutional rights are subordinate to venue statutes and procedural rules. An enabling statute authorized

the construction of a unitary structure on the Rio Grande River for the Falcon project. A single body of land was aggregated by the condemnations across a county boundary for that one purpose. These undisputed facts do not justify the disparate classification of landowners or permit the denial of fundamental Constitutional rights. It has been consistently recognized that the guarantee of equal protection is not inapplicable because discrimination is based upon some group characteristic such as geographic location. *Rodriguez*, 411 U.S. at 92 (Marshall, dissenting). Indeed, the geographic location of Guerras' land in Starr County is the sole reason that it is disfavored.

The opinion of the court below will undoubtedly be read by Federal condemning authorities as approving selective disparate treatment of owners of land if strategically done through separately filed successive actions. Such holding flouts the paramount constitutional issues that should prohibit such disparate treatment, whether through dual or single condemnation proceedings, so long as they are intended to accomplish the same public purpose.

C. The Condemnation Law Principle That the Validity of a Taking is Viewed According to the Facts Existing at the Time of Taking Has Been Erroneously Applied

The court in its opinion says that it was compelled to follow the recognized principle that the validity of the taking of Guerra's mineral estate must be viewed according to the facts existing at the time of taking. 207 F.3d at 767. It considered that at such time the United States had not yet thought of using easements as a more reasonable method of prohibiting drilling and, therefore, its condemnation of his

mineral estate was its only perceived method of prohibiting drilling. Therefore, it was reasonable and valid. *Id.*

The court of appeals however misapprehended when the discrimination occurred. The discrimination occurred when Guerra was not offered, along with the other condemnees, the benefit of the easement plan. This failure was after both condemnations had gone to judgment. The plan called for *amended* judgments of taking that deleted the oil and gas estates. The rationale of the court's finding mistakenly elevates a valid principle of condemnation law above the paramount constitutional issues of denial of due process through unequal treatment and deprivation of property without public purpose. *See Catlin v. United States,* 324 U.S. 229, 240 (1945) (Takings Act not intended to prevent claim of constitutional deprivation.).

The court's finding that separate condemnation actions to acquire adjoining properties for the same public reservoir allows the Government to employ disparate policies is wrong. It rewards the United States with valid title to the valuable oil and gas estate taken from Guerra because the United States, according to a questionable finding of fact by the appellate court, had not perceived at the time of taking the more reasonable method of prohibiting drilling by nondrilling easements. The court found that the time-of-taking rule rendered immaterial Petitioners' undisputed comparative evidence of the absence of public purpose for taking Guerra's mineral estate. Petitioners offered twenty-two sample stipulations and amended judgments of taking that excluded the oil and gas estates in Zapata County. In each stipulation the United States expressly agreed that the owner's oil and gas estate was not required. The twenty-two attendant amended judgments each except the oil and gas estates and, instead, condemn only nondrilling perpetual easements.

This indisputable evidence shows that the oil and gas estates in the entire reservoir were not required. Accordingly, the part of the reservoir acquired from Guerra should not have required his oil and gas estate for the purpose of prohibiting drilling. By ignoring these facts, the lower court subordinated both the equal protection standard of the Due Process Clause and the Public Purpose Clause of the Fifth Amendment to the time-of-taking rule of condemnation law, and this is error.

The court of appeals' harsh application of this rule is questionable not only for its failure to invoke the paramount constitutional prohibition, but also because the chronology of the undisputed facts raises the question of the good faith of the United States in condemning Guerra's mineral estate. Guerra's land was taken on January 3, 1949, by Declaration of Taking. The summary judgment record is silent as to the exact date the United Stated decided to prohibit drilling by using nondrilling easements. The plan was made known on October 26, 1949 to the principal owners of oil and gas interests in the Zapata County lands. But the district court jury trial on the issue of the value of Guerra's land was not until June, 1951. The earliest amended judgment deleting the oil and gas estate from a parcel of land in Zapata County was in September, 1952. Numerous like amended judgments followed through December 31, 1956, when all oil and gas estates in the Zapata County part of the reservoir had been revested. Therefore, it is undisputed that the United States pursued its prosecution to condemn Guerra's mineral estate in a court trial that occurred 20 months *after* the announcement of the easement plan to some of the Zapata County owners. From October 26, 1949, and likely earlier, Guerra was as eligible to be offered the plan as was any other affected owner. Thus, the undisputed facts make the taking suspect. This subsequent conduct of the United States imputes to it

motives that relate back to the date it took Guerra's mineral estate.

The court of appeals ignores these facts because it decided that the two separate condemnation proceedings bore no comparative relationship. Therefore, it concludes, because the easement method of prohibiting drilling may not have been perceived on January 3, 1949 when Guerra's land was taken, that the condemnation of his mineral estate for the purpose of prohibiting drilling was rational and was done for a perceived public purpose. This is also error.

Neither the venue statute, nor the Declaration of Taking Act should be the basis for invidious discrimination against a single property owner as Guerra. This court in 1945, upheld the constitutionality of the Declaration of Taking Act, saying that it is a procedural statute, not intended to deny to a private owner constitutionally guaranteed rights. *Catlin v. United States*, 324 U. S. 229, 240 (1945). The Fifth Circuit Court of Appeals, however, has in this case erroneously permitted two procedural statutes, the venue statute and the Declaration of Taking Act, to outweigh the controlling provisions of the Fifth Amendment to the constitution.

Here, the conduct of the United States evidences a purpose for taking Guerra's minerals which is beyond the mere prohibition of drilling. Mineral properties have only two possible uses. Either they can be mined and produced for the realization of their value, or they can be kept in place unproduced. When it is shown so clearly that the United States elected to proceed with its condemnation of Guerra's mineral estate long after it had decided to control drilling by obtaining easements, it necessarily had the unconstitutional intent to keep Guerra's minerals for the commercial value

they may have had. There is no other possible construction of the facts.

The court of appeals denies any effect of this undisputed evidence because of its spurious reasoning that elevates above the fundamental constitutional rights of Guerra the court's finding that his mineral estate was taken on January 3, 1949 for a perceived rational purpose.

D. Independent Action Provides Jurisdiction to Vacate Judgment of Condemnation Where There is a Grave Miscarriage of Justice

As an alternative to Quiet Title Act jurisdiction, this cause has proceeded as an "independent action." While this doctrine has ancient roots in the common law, it is specifically mentioned and preserved in amendments to Rule 60(b). "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . ." FED. R. CIV. P. 60(b). In *United States v. Beggerly*, 524 U.S. 38, 41-49 (1998), this court made an extensive analysis of the independent action procedure, holding that an action "brought in the same court as the original lawsuit requires [no] independent basis for jurisdiction." *Id.* at 46. However, the court said, such an action is available only to prevent "a grave miscarriage of justice," which was not found in that case. *Id.* at 47.

While the appellate court was not impressed that this was such a case, the facts recorded here cry out for a remedy. Further, the facts are vastly different from *Beggerly*. They show a sustained pattern of fraud, concealment, misrepresentation, and deceit practiced by the Government against the Guerra family over a period of decades,

culminating in the commercial production of Guerra's minerals. The condemnation judgment ought not, in equity and good conscience, be enforced against the Guerras, who have a good defense to the Government's wrongful taking of their minerals, but who were prevented from urging that defense by the Government's perfidy, who are not guilty of any fault or negligence and have no adequate remedy at law. In the absence of relief, the Government will walk away with over $72 million in windfall royalties as a reward for its wrongful, discriminatory taking of the Guerras' minerals, having promised the Guerras that their minerals must be taken "to prevent drilling." An independent action challenging a fraudulent judgment is designed to correct injustices which are "sufficiently gross" and "has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 248 (1944). Such an independent action is a form of equitable relief which is entirely justified in this case.

Beggerly failed to prove his claim of misrepresentation under Rule 60(b)(3). *Beggerly*, 524 U.S. at 41-49. Here, the Government's own decision that the minerals were not required to be taken means that Guerra's minerals were likewise not required. Thus the Government's condemnation of his mineral estate without a public purpose would be void. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984). The district court, upon finding an absence of public purpose, had no discretion but to declare the taking was void. FED. R. CIV. P. 60(b)(4). A void judgment, of course, amounts to a grave miscarriage of justice.

CONCLUSION

The judgment of the court of appeals mistakenly elevates a recognized rule of condemnation law over controlling constitutional guarantees by approving the Government's taking of Guerra's oil and gas estate without perceived public purpose and by unlawful discrimination.

The Guerras' petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed March 28, 2000]

No. 98-41254

HEIRS OF H P GUERRA, DECEASED, *Plaintiff-Appellee,*	)
v.	)
UNITED STATES OF AMERICA, Et. Al., *Defendants,*	)
UNITED STATES OF AMERICA, *Defendant-Appellant.*	)

Appeal from the United States District Court
For the Southern District of Texas

OPINION

Before POLITZ, JOHN R. GIBSON,* and HIGGINBOTHAM, Circuit Judges. PATRICK E. HIGGINBOTHAM, Circuit Judge:

This is a saga from the border, worthy of the creativity of Cormac McCarthy. Its roots are earlier, but for our purposes, its genesis is the 1949 condemnation of mineral rights taken as part of the construction of the Falcon dam and reservoir along the U.S. Mexican border. The government condemned approximately 3,000 acres of Horace Guerra's land and the accompanying mineral rights and compensated him pursuant to a final judgment. Guerra and later his heirs repeatedly requested revestment of the mineral rights. The government refused and by the mid-1980s had begun leasing the rights to third parties. In 1995, with a large fortune now at stake, the heirs brought this suit under the Quiet Title Act and Fed.R.Civ.P. 60(b), alleging an invalid taking and a violation of equal protection. The district court granted summary judgment to the Guerras. Today we REVERSE and grant summary judgment to the United States, holding that the heirs' claims cannot be brought under the Quiet Title Act and do not justify relief from the condemnation judgment under Fed.R.Civ.P. 60(b).

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* Circuit Judge of the Eighth Circuit, sitting by designation.

I

The condemnation was part of the Falcon dam and reservoir project built between Laredo and Roma, Texas. Congress authorized the condemnation in 1936 for the construction of dams and reservoirs on the U.S.-Mexican border with the lofty ambition of evening the episodic flow of the Rio Grande River. The Falcon project's dam and reservoir would cover an area of land cutting across Starr and Zapata Counties. Horace Guerra's land was located in Starr County and included the site of the planned dam.

In January 1949, the government filed declarations of taking to condemn Guerra's and the other Starr County owners' property. As only the surface and perhaps some constraints upon the exploitation of minerals seemed necessary to the project, Guerra and several other Starr County landowners wrote to the government asking to have their mineral interests excluded from the condemnation. The government responded that it would further consider the issue of revestment. What consideration the government gave we do not know. We do know that Guerra was not offered revestment.

In December 1949, the government condemned the land of the Zapata County landowners. It developed a plan for Zapata County whereby those landowners whose land met specific hydrogeologic conditions could retain title to their mineral interests or have them revested subject to a perpetual non-drilling easement. Zapata County landowners received written notice of the policy.

In December 1951, a jury awarded Guerra over $79,300 for the taking of his surface and mineral interests, substantially more than the government had offered. The Fifth Circuit affirmed the award in 1953 after the government appealed. The Guerras contend that Horace Guerra was unaware of the Zapata County policy until after the judgment had become final. He continued to petition for the return of the mineral interests, however, and in 1955, the government agreed to return the mineral interest regarding 677 acres of the land acquired from Guerra. After Guerra died, his heirs (the "Guerras") continued to request revestment of mineral rights throughout the 1950's and in 1960, 1980 and 1981. In 1981, the government told them again that it would not allow mineral exploration in the vicinity of the Falcon Dam and would not revest those rights.

Meanwhile, the government undertook various activities regarding the Guerras' condemned land. In 1954, it leased a 472-acre tract of the land to the State of Texas to use as a park, retaining the mineral interests. Sometime after 1959, the government began granting oil and gas leases on the land. It issued two leases in the early 1980's. In 1983, the government entered lease negotiations with Huffco Petroleum Company for portions of the Guerra land that had not been previously leased. The government granted this lease in 1986 based on Huffco's evidence that it could safely explore the area with new technology. Huffco recorded the lease in 1991. The Guerras noticed drilling activities in 1992.

In 1995, Guerra's heirs filed suit under the Quiet Title Act (the "QTA"), Rule 60(b), and an independent action theory. On cross-motions for summary judgment, a magistrate judge recommended revestment of title in the

mineral interests to the heirs and an award of restitution totaling $71.6 million. The district court adopted the recommendation of the magistrate judge. The government appealed under a variety of theories: that the court lacked jurisdiction to hear any claim; that it had no jurisdiction under the QTA; that the statute of limitations had run under the QTA; that res judicata bars the suit; that the heirs failed to satisfy the requirements of 60(b); and that the remedies of revestment and restitution are unavailable under either the QTA or 60(b).

II

The Guerras' claim to the mineral interests rests on two distinct legal assertions: that the initial taking of Horace Guerra's land was invalid, and that the government's refusal to revest the mineral rights since then amounts to a violation of equal protection. Their challenge to the validity of the taking faces significant hurdles given the final condemnation judgment and the passage of almost 50 years.

First, we cannot accept in full the government's argument that title cannot be disputed after the initial declaration of taking. We are persuaded rather that a declaration of taking creates only defeasible title, which the landowner is entitled to challenge.[1] Once a judgment has been entered in a condemnation proceeding, however, it enjoys the finality of a civil judgment.

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[1] See Catlin v. United States, 324 U.S. 229, 241 (1945).

The Quiet Title Act permits suit in cases in which the title to property is "disputed."[2] The district court allowed the heirs to pursue their claims under the QTA. We find no authority for the proposition that the QTA offers an escape from the constraints of res judicata. The two courts that have allowed QTA suits as a challenge to the validity of prior condemnation proceedings did so where the plaintiffs had received no notice of the proceeding and thus could not have participated in it.[3] In those cases, res judicata would not have precluded the claim; the plaintiffs needed only an avenue to get into court. Here, Horace Guerra participated fully in the condemnation proceedings. Even assuming that a QTA suit might be a proper vehicle for a challenge to a condemnation judgment under some circumstances,[4] it does not act to circumvent res judicata.

Alternatively, the Guerras seek to employ Rule 60(b) of the Federal Rules of Civil Procedure to directly attack the condemnation judgment.[5] The provision of Rule 60 potentially available to the Guerras is 60(b) (6), which allows

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[2] 28 U.S.C. § 2409a (1999).

[3] See Fulcher v. United States, 632 F.2d 278, 285 (4th Cir. 1980) (en banc); United States v. Herring, 750 F.2d 669, 673 (8th Cir. 1984).

[4] The First Circuit has held that Quiet Title Act suit cannot proceed after a condemnation judgment. See Cadorette v. United States, 988 F.2d 215, 225-26 (1st Cir. 1993) (Breyer, C.J.).

[5] See FED.R.CIV. P. 60(b) (1999).

a court to vacate a judgment when it is appropriate to accomplish justice.[6] A court may grant relief under 60(b) (6) only under extraordinary circumstances.[7]

The Guerras argue that evidence discovered after the final judgment -- the Zapata County revestment policy and the government's leases to third parties -- reveal that the original taking was invalid. A condemnation is valid if, at the time of the taking, the government's exercise of eminent domain served a valid statutory purpose.[8] Courts have limited power to review an agency's determination of public purpose.[9] A

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[6] The first three provisions of Rule 60(b) are time-barred after one year. Rule 60(b) (4) allows relief only if the initial court had no jurisdiction over the proceedings or if the proceedings violated due process. The Guerras do not allege any jurisdictional defect or procedural failure regarding the condemnation suit itself. Relief under Rule 60(b) (5) is also unavailable here: that rule allows only relief from a judgment that has prospective effect. See In re Moody, 849 F.2d 902, 906 (5th Cir. 1988).

[7] See Klapprott v. United States, 335 U.S. 601, 613-14 (1949); American Totalisator Co., Inc. v. Fair Grounds Corp., 3 F.3d 810, 815 (5th Cir. 1993). The independent action theory, under which the Guerras also seek relief, presents a similarly high hurdle: it requires a case of gross injustice sufficient to demand a departure from res judicata. See United States v. Beggerly, 118 S. Ct. 1862, 1866-67 (1998).

[8] Catlin, 324 U.S. at 241.

[9] See United States v. 2,606.84 Acres of Land, 432 F.2d 1286, 1289 (5th Cir. 1970).

court may invalidate a taking only if the officials acted in bad faith or so capriciously and arbitrarily that the action was without an adequate determining principle.[10] In examining whether the taking was arbitrary and capricious, we look at the agency's authorization to condemn the land. The enabling legislation for the Falcon project authorized the agency to take any "real or personal property which may be necessary."[11] The statute did not define "necessary."

We fail to see how the government's policy for Zapata County landowners made the taking of the Starr County mineral interests arbitrary and capricious. When it undertook the first stage of condemnations, the government's initial policy was to condemn the mineral rights in order to secure the safety of the dam and reservoir. That a year later, the government felt secure in initiating a new policy for the next stage of condemnations does not render the taking of Guerra's interest without an adequate determining principle. The policies developed over time and at separate stages of condemnations for the project.

Nor can we infer from the government's leasing of the rights that it had originally condemned the land in bad faith. Equally, the government's abandonment of the non-use policy in the early 1980's does not invalidate the taking. The government may change its use of the property without

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[10] See United States v. Carmack, 329 U.S. 230, 243 (1947).

[11] See 22 U.S.C. 277c(b) (1936).

affecting the validity of the original condemnation.[12] The events subsequent to the taking of the Guerras' land, including the government's changed policy regarding revestment and its altered uses of the land, do little to suggest the invalidity of the original condemnation. We find no extraordinary circumstance that would justify re-opening the judgment.

The Guerras also contend that the refusal to revest the mineral rights denies them equal protection under the Fifth Amendment. It is uncertain whether the government even classified Starr County landowners differently from Zapata County landowners by undertaking the condemnations at separate times and using different policies. Even assuming that the government's actions did classify the two groups differently, the classification involves no suspect class and thus need only bear a rational relation to a legitimate governmental purpose.[13] The government condemned land in the two counties at different times, and it was not irrational to refuse to make the Zapata County policy retroactively available to the Starr County landowners.

The Guerras fared more poorly than did their Zapata County neighbors in the Falcon Dam saga, and the government's steadfast refusal to revest their mineral rights, coupled with its current profits in leasing those rights, makes the government's policies seem inequitable. But much government action that is less than ideal falls short of a constitutional injury. The Guerras were paid for the minerals

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[12] See Higginson v. United States, 384 F.2d 504, 507 (6th Cir. 1967).

[13] Richard v. Hinson, 70 F.3d 415, 417 (5th Cir. 1995).

in an amount fairly determined in litigation. The government became the record owner. The later development of the mineral interests and their greatly enhanced value reflect the good fortune of the owner of the minerals. That the minerals were acquired in condemnation does not make that circumstance unfair or illegal. Ultimately, the Guerras' allegations of an invalid taking or an equal protection violation cannot overcome the deference courts owe governmental bodies to accomplish legislative ends. The acts of which the Guerras complain are thus not ours to remedy.

REVERSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McCALLEN DIVISION

[Filed June 26, 2000]

No. M-95-041

HEIRS OF H.P. GUERRA,)
Plaintiffs)
v.)
)
UNITED STATES OF AMERICA,)
Defendant)
)

FINAL JUDGMENT

In accordance with the Mandate of the United States Court of Appeals for the Fifth Circuit, it is

ORDERED and ADJUDGED that this action is hereby dismissed with prejudice. It is further ordered that each party shall bear their own costs.

Done this 26th day of June, at McAllen, Texas.

/s/
Hon. Filemon B. Vela
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McCALLEN DIVISION

[Filed November 12, 1996]

No. M-95-041

HEIRS OF H.P. GUERRA, *Plaintiffs*	)
v.	)
UNITED STATES OF AMERICA, *Defendant*	)

ORDER

Before this Court is the Magistrate Judge's Report and Recommendation on the above-referenced cause of action. After a de novo review of the entire file, it is the opinion of this Court that the Magistrate Judge's Report and Recommendation should be adopted.

In support thereof, this Court further took into consideration H.P. Guerra's resistance from the outset, during his lifetime, with respect to the Government's request for his waiver as to the mineral interests covering the property to be condemned by the United States for the Falcon Dam Project,

not a part of any restricted territory. Moreover, subsequent petitions were filed with International Boundary & Water Commission, United States Section, requesting that the referenced mineral rights be revested in favor of Plaintiffs. The Commission, however, continued to maintain its position that such action was not a viable option, as no drilling activities could ever take place on the land in question. Further, the United States was in the middle of negotiations with prospective oil and gas developers during the period a similar petition was filed by Plaintiffs in 1981. Despite such negotiations, the United States persisted that revestment was impossible, as drilling could never be allowed on said properties. Further, the oil and gas lease which ultimately entered into effect in 1986 was never recorded in Starr County until 1991. Thereafter, Plaintiffs first became aware of such drilling operations in 1992.

In determining when the Quiet Title Act's twelve-year statute of limitations period begins to run, one must first define the Government's claim and, then, must look to the time that it, acting adversely to interests of Plaintiffs, sought to expand that claim. 28 U.S.C.A. §2409a(g); *Werner v. United States,* 9 F.3d 1514 (11th Cir. 1993). The public position of the United States until 1981 was that no drilling activities whatsoever could be allowed on the condemned properties previously owned by H.P. Guerra, deceased. In 1986, however, the United States negotiated an oil and gas lease covering said lands. Moreover, constructive notice of said lease, constituting the United States' expanded claim on the property in question, cannot be imposed on the Plaintiffs, as such was not made of public knowledge until it was recorded in Starr County in 1991. *Narramore v. United States,* 852 F.2d 485 (9th Cir. 1988). Accordingly, the

subject claim was timely filed, as Plaintiff's cause of action did not accrue until 1991.

It is therefore ORDERED, ADJUDGED, and DECREED that the Government's Motion to Dismiss be DENIED and the Plaintiff's Motion for Summary Judgment be GRANTED.

Done at Brownsville, Texas, this 8th day of November, 1996.

/s/_____
FILEMON B. VELA
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed June 6, 2000]

No. 98-41254

HEIRS OF H P GUERRA, DECEASED,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, Et. Al.,
Defendants,

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas, McAllen

ON PETITION FOR REHEARING

Before POLITZ, JOHN R GIBSON,* and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/_____
Patrick E. Higginbotham
United States Circuit Judge

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* Circuit Judge of the Eighth Circuit, sitting by designation.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

[Filed July 15, 1998]

No. M-95-041

HEIRS OF H.P. GUERRA, *Plaintiffs*	)
v.	)
UNITED STATES OF AMERICA, *Defendant*	)

FINAL SUMMARY JUDGMENT

Came on to be heard Plaintiffs' Amended Motion for Final Summary Judgment and the Magistrate Judge's Report and Recommendation dated July 24, 1996, and it appears that on November 8, 1996 this court entered an order granting Plaintiffs' [First] Motion for Summary Judgment and denying Defendant's Motion to Dismiss, or in the alternative, Motion for Summary Judgment, and that such findings and conclusions included in such order were interlocutory.

And the court having fully considered Plaintiffs' Amended Motion for Final Summary Judgment, the government's response and all attendant briefs and exhibits, is of the opinion that the Magistrate Judge's Report and Recommendation should be adopted; that the district court has jurisdiction under 28 U.S.C. §§1331, 1346(f) and 2409a and that venue is proper; that there is no genuine issue as to any material fact and that plaintiffs, are entitled to a final summary judgment as a matter of law pursuant to Rule 56(a), awarding and quieting title in them to the subject mineral interest in controversy (subject to the existing oil and gas leases and compensatory royalty agreements, shown of record and acknowledged by plaintiff's), and ordering payment of restitution from the government in the amount of the full value of the royalty payments received since the date of initial production.

In this connection, the court makes the following Findings of Fact and Conclusions of Law:

1. That the government policy of revesting the minerals or imposing a drilling easement, where the taking was deemed unnecessary to the public purpose, was concealed from Guerra and his heirs.

2. That the concealment of government policy and the misrepresentations as to the intended use of the Guerras' mineral interest were intended to be relied upon and were relied upon by H. P. Guerra and his heirs to their detriment, in entering into the Judgment on Stipulation, and the surrender of their minerals without further litigation.

3. That the taking and use of Guerras' mineral estate by the government for the leasing, commercial production, and the receipt and disbursement of the royalty proceeds into the general revenue accounts of the government, is for an unlawful, purpose or purposes and is unconstitutional.

4. That the taking of Guerras' mineral estate was a violation of the right of due process and equal protection guaranteed under the Fifth Amendment of the U.S. Constitution.

5. That in the taking of Guerras' mineral interest and refusal to revest the same, the government failed to follow its own policy relative to lands not needed for the project.

6. That the taking of Guerras' mineral estate was arbitrary, capricious and done in bad faith.

7. That H. P. Guerra was discriminated against in the taking of his mineral interest and in the refusal to revest that estate, in light of the favorable treatment afforded neighboring landowners similarly situated.

8. That the government consistently represented that the original taking and the refusal to revest the Guerras' mineral interest were necessary to protect the project from drilling and production. That such representations were false and reckless, and were even continued during the 1981-1992 time frame when the government negotiated its own oil and gas leases.

9. That plaintiffs' claim did not accrue until 1991 at the earliest, when the government first recorded its leases in Starr County, Texas. Accordingly, this action is brought within 12 years of the date upon which the plaintiffs or their predecessor in interest knew or should have known of the claim of the government, and is not barred by 28 U.S.C. § 2409a(g).

10. That prior to filing the lawsuit, the government has received royalties in the stun of $23,814,950 from the production and sale of gas on the subject property. That after the filing of suit, and through February 1998, the government has received royalties in the sum of $47,836,123.

11. That the mineral interest of the plaintiffs has been diminished in value in the total sum of $71,651,073, being the aggregate amount of royalty proceeds collected by defendant during its unlawful possession of the subject property and without lawful title.

12. That the purported title taken by the defendant to the mineral interest in Cause No. 575 is void *ab initio,* and that such estate is subject to continuing depletion by the production and removal of the gas from the leased premises.

13. That while plaintiffs are entitled to restoration of title to their mineral interest, the gas already produced and sold cannot be returned in kind.

14. That the defendant has been unjustly enriched by the receipt of royalties to which it was not entitled.

15. That plaintiffs are entitled to restitution from the defendant of their full mineral interest. For the gas already produced and sold, plaintiffs are entitled to a monetary recovery of the value of the gas so appropriated.

16. That an equitable lien and constructive trust should be impressed upon the mineral interest wrongfully held by the defendant and the royalties as received by the defendant, until the full mineral interest and monies are restored to plaintiffs.

17. Accordingly, in addition to the quieting of title in the plaintiffs of their full mineral interest, plaintiffs are entitled to judgment requiring the government to pay plaintiffs the sum of $71,651,073, (less offset for the consideration of $84,309 received by H. P. Guerra in 1955) and an additional sum in the amount of all royalties received by the government after February 1998, together with interest, both before and after judgment, at the maximum rate allowed by law.

The court further adopts and reaffirms the Magistrate Judge's Report and Recommendation filed July 24, 1996, and the findings and conclusions of this court's order of November 8, 1996.

The court further finds that in Plaintiffs' Second Amended Complaint, the plaintiffs have elected to sue only the United States, have dismissed the other defendants

claiming under oil and gas leases, and have elected "to recognize and accept such leases upon the restoration to them of their oil and gas estate in the subject lands."

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the Heirs of H.P. Guerra, who are J.C. Guerra, Margarita G. Salinas; H.P. Guerra, III; Hector F. Guerra; Richard L. Guerra; Rose Marie G. Rodriguez; Ruben R. Guerra, Jr.; W.T. Guerra; Rose Theresa G. Massey; Kati M. Guerra; James C. Guerra; Patrick M. Guerra; David N. Guerra, Trustee of the Estates of Jacquelyn I.G. Narro and Barbara M. Guerra; Cecilia G. McAuliff; Heron A. Guerra; Luis A. Guerra; Dennis D. Guerra; Rosalinda G. Guerra, Trustee of the Virgil H. Guerra, Jr. Trust and the First State Bank and Trust Company of Mission, Texas, Trustee of the Estate of James Jeffries, Jr.; their heirs, legal representatives, executors, successors and assigns (the plaintiffs herein), have and recover judgment from the United States of America (the defendants herein), as follows:

1. That the judgment of condemnation, awarding title to the United States of America, in Cause No. 575, United States District Court, Southern District of Texas, Brownsville Division, is hereby vacated and held for naught, and instead, title shall be vested hereafter in the plaintiffs herein, Heirs of H. P. Guerra, as their respective interests may appear, and title shall be quieted in them, to the property hereinafter described (the subject "mineral interest"):

> lying in Porcions 55, 56 and 57, Mier Jurisdiction of Mexico, now Starr County, Texas, bounded on the north by the Starr-Zapata County common boundary: on the

> south by the north boundary of the United States' Restricted or Operations Area located approximately 2,300 feet north of and parallel with the axis of thc Falcon Dam; on the west by the left bank of the Rio Grande River as before inundation for the Falcon Reservoir, and on the East by the East boundary of the United States Reservation for the Falcon Reservoir Project; also including the irregularly shaped approximately 148.6-acre Parcel S-1, Tract 2 tract in Portion 55 and the 14.53-acre tract 2, 111.89 feet long and 300 feet wide in Porcion 56

which mineral interest is subject to the following oil and gas leases and compensatory royalty agreement executed by the United States of America covering an aggregate of 1,735.226 acres, as follows:

> Guerra "A" Gas Unit, in which the U.S.A. lease No. NM-A-42853 TX (414.80 acres) contributed 100.675 acres of the 352-acre Gas Unit and the U.S.A. lease No. TX NM 31995 (34.156 acres) contributes 26.401 acres of such Gas Unit; Guerra "B" Gas Unit, in which the U.S.A. lease No. NM-A-54933 TX (148.60 acres) contributes 119.394 acres of the 352-acre Gas Unit; Ramirez "E" Gas Unit, in which the U.S.A. lease No. NM-A-42853 TX (414.80 acres) contributes 89.681 acres of the 352-acre Gas Unit, and the U.S.A. lease No. TX NM 31995 (34.156 acres) contributes 7.759 acres of such Gas Unit; 1,123.14-acre

U.S.A. lease No. TX NM 70401; 198.004 acres out of the lease No. NM-A-42853 TX (414.80 acres); Guerra "C" 640.0-acre Gas Unit, in which the U.S.A. lease No. NM-A-54933 TX (148.60 acres) contributes 29.206 acres; and Guerra "D" 640.0-acre Gas Unit, in which the U.S.A. 14.53- "Royalty Agreement" contributes 14.53 acres and the U.S.A. lease No. NM-42853 TX (414.80 acres) contributes 26.44 acres,

PROVIDED, however, that the Heirs of H.P. Guerra, their heirs, legal representatives, executors, successors and assigns, are forever prohibited from drilling on the subject lands at any location below 307 feet above sea level a well in search of oil or gas, and that the exploration and development of the oil and gas under all of said lands is permitted only by directional or vertical hole drilling at locations above 307 feet above sea level.

The above adjudication of title and ownership in plaintiffs shall be effective from the date of the taking of the subject mineral interest on January 3, 1949, and shall include without limitation all rights of ownership of a lessor including the right of reverter, and the title and possession of all royalties, payments and consideration due or reserved under the oil and gas leases and compensatory agreement executed by defendant, and described above.

2. As restitution for the subject mineral interest wrongfully appropriated by the defendant, and to prevent

unjust enrichment by royalty payments already received, defendant shall pay to plaintiffs, and plaintiffs shall have and recover from the defendant, the sumof $71,651,073 (less the sums paid H. P. Guerra in condemnation for his mineral interest), together with any and all royalties, payments and consideration received by the defendant on the subject mineral interest after February 1998 and until finally paid.

3. In addition to the monetary judgment above, plaintiffs shall recover prejudgment interest and post judgment interest at the highest lawful rate, until this judgment is paid and discharged.

4. The Defendant's [United States] Motion to Dismiss, or in the alternative, Motion for Summary Judgment, is DENIED, and any other motions which have not been ruled upon are denied or denied as moot, it being the court's intent to render judgment final in all respects.

5. All costs of court are adjudged against defendant.

6. Execution upon this judgment is stayed until sixty (60) days after this judgment becomes final.

Done at Brownsville, Texas, this 13th day of July, 1998.

/s/_____
HON. FILEMON B. VELA
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS McCALLEN DIVISION

[Filed July 24, 1996]

No. M-95-041

HEIRS OF H.P. GUERRA, *Plaintiffs*	)
v.	)
UNITED STATES OF AMERICA, *Defendant*	)

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before this Court is United States of America (Government) Motion to Dismiss and Plaintiffs' Motion for Summary Judgment. The Honorable Filemon B. Vela, District Judge, having jurisdiction over the above-styled and numbered proceeding, has directed this Court to consider the matter and file a report and recommendation herein.

This Court has read the parties' pleadings, listened to their counsel's arguments, considered the issues raised in light

of the legal and equitable precedents, and is of the opinion that the Government's Motion to Dismiss should be denied and the Plaintiffs, Motion for Summary Judgment should be granted. In support of the aforementioned conclusion, this Court files the following findings of fact and conclusions of law.

Findings of Fact

1. The Congress of the United States in 1935 authorized the President to construct, operate, and maintain a series of dams and reservoirs on the Rio Grande River deemed by him to be necessary and proper according to treaties contemplated between the United States and Mexico.

2. In 1936, Congress passed 22 U.S.C. § 277c which authorized the acquisition of lands "necessary" to carry out its earlier authorization. A treaty was signed between the United States and Mexico in 1945 providing for the joint construction of these dams and reservoirs to conserve, store, and regulate "the greatest quantity of the annual flow of the river."

3. One of the authorized dams was agreed to be located on the river between Laredo and Roma, Texas. The Falcon site was fixed by agreement between the Mexican and United States Sections of the International Boundary & Water Commission.

4. The United States filed Civil Action No. 575, the condemnation action versus the lands of H.P. Guerra, in this Court on December 27, 1948. On January 3,

1949, the Government filed its Declaration of Taking of H.P. Guerra's lands. The Declaration of Taking states the taking of H.P. Guerra's lands to be "necessary and adequately to provide for the utilization of the waters of the Rio Grande."

5. The Commissioner of the United States Section of the International Boundary & Water Commission, in March 1949, sent a delegation of three Government officials to see H.P. Guerra for the purpose of informally procuring from him a written waiver of his oil and gas rights. On March 11, 1949, a waiver-letter was signed by H.P. Guerra. In the letter, H.P. Guerra states, "It seems hard to me that the Government should have to pay for minerals which it neither wants nor intends to use. . ." H.P. Guerra was not advised of the policy of the Government at Falcon which would have afforded him the option to retain his mineral rights subject to a non-drilling easement.

6. This policy was announced only to "the principal owners of oil and gas interests in Zapata County" by the Commissioner, United States Section of the International Boundary & Water Commission. H.P. Guerra's adjoining neighbor on the north, Eduardo Yzaguirre, was among numerous affected owners in Zapata County who were permitted under the Government policy to retain his oil and gas rights. The Government entered into a written stipulation with Eduardo Yzaguirre, as it did with almost all of the affected owners in Zapata County, that the oil and gas estate in the lands acquired from him "was not

required" for the public purpose. The judgment of taking of Eduardo Yzaguirre's land expressly excluded the oil and gas estate which remained vested in him.

7. In zapata county, the Government employed perpetual non-drilling easements on areas below the 307-feet above sea level contour to prohibit drilling operations within the contemplated water storage reservoir. H.P. Guerra's lands only were condemned by the Government in fee simple absolute title, including the mineral estate said to be required to prohibit drilling.

8. In 1960, 1980, and 1981, the commissioner of the International Boundary & Water Commission, United States Section, denied applications of the HEIRS OF H.P. GUERRA (GUERRA HEIRS) for re-vestment of H.P. Guerra's oil and gas estate, claiming upon each occasion that re-vestment by the Government was not possible for the reason that drilling operations could never be permitted on these properties as a precaution against surface subsidence and possible resulting physical damage of the Falcon Dam. In 1981 the Commissioner of the International Boundary & Water Commission, in a letter to H.P. Guerra's attorney, said that he could not foresee that the Government would ever revest the oil and gas estate in these properties, or that they would ever be available for lease for oil and gas exploration and development. He insisted that drilling on these lands must be prohibited.

9. The Government, at the time of the Commissioner's letter, accepted an application for an oil and gas lease covering 414.8 acres of these properties. It favorably

processed this application, and issued an oil and gas lease on December 1, 1981. This lease was not recorded in the public records of Starr County, Texas, until July, 1991. It is presently producing oil and gas for the private lessee and for the Government as the lessor-royalty owner.

10. The leased 414.8-acre tract lies within the 472-acre tract which is the subject of Plaintiffs' First Count of their Second Amended Complaint. Before the final judgment of this Court in 1954 confirming the taking of H.P. Guerra's land, the Government leased to the State of Texas an upland tract of 563.15 acres, 472.48 acres taken from H.P. Guerra and 90.67 adjoining acres taken from Eduardo Yzaguirre. This tract lies entirely above 307 feet above sea level. The purpose of the State lease was for a public State park. The enabling statute, 22 U.S.C. § 277b and c, did not empower the United States to take land for a State park.

11. Because the State of Texas made no substantial effort for years to create a park, the Commissioner of the International Boundary & Water Commission in 1972 reported the 563.15 acres to the General Services Administration (GSA) as "excess property." He requested that the tract be sold as unneeded property, certifying its possible use to be "farming or ranching." The State of Texas acquired the 536.15-acre tract from the GSA by deed without warranty filed in Starr County, Texas, on March 6, 1987. This deed reserves to the Government the oil and gas estate under only the 472.48 acres taken from H.P. Guerra.

The Government, in October 1952, had revested to Eduardo Yzaguirre the oil and gas estate in his 90.67 acres, stipulating on the record that his oil and gas estate was "not required" for the public project.

12. The retention by the Government of H.P. Guerra's minerals in the unneeded 472.48 acres was a departure from the policy communicated by the Secretary of State in 1955, directing the General Services Administrator to return its original owner a tract of 903.3 acres of land condemned for the Falcon Project in Zapata County, but afterward determined by the Government to be unneeded. The Secretary advised GSA "that justice required the excess lands be returned to the former owners that wanted them."

13. Had the 472.48 acres been returned to H.P. Guerra, the tract would have been free of a non-drilling easement, since the surface of all of this land is above the 307-foot elevation.

14. Plaintiffs' cause of action was filed on February 21, 1995, and is brought under Amendment V of the constitution of the United States. The GUERRA HEIRS allege that the Government took from H.P. Guerra for private and non-public uses the oil and gas estates in his lands situated in Starr County, Texas. These lands were condemned for the Falcon Dam and Reservoir. The GUERRA HEIRS claim discrimination against H.P. Guerra because the Government took his oil and gas rights, when it permitted similarly situated landowners in Zapata County to retain their oil and gas rights. The lands in

Zapata County were condemned for the same public purpose.

15. According to Plaintiff, the Government concealed from H.P. Guerra its policy for the Falcon Project, which was communicated only to the principal owners of oil and gas interests in Zapata County. The policy fixed by the Government affected owners of properties condemned for the Falcon Project. It provided to them the option to retain their oil and gas rights subject to their acceptance of a perpetual non-drilling easement prohibiting wellsite locations in areas lying below 307 feet above sea level. This policy prevented wellsites within the contemplated water storage reservoir.

16. The GUERRA HEIRS claim that the Government's concealment from H.P. Guerra of this policy denied him his constitutional guarantee of equal protection under the law and due process of law. Finally, the GUERRA HEIRS alleged that the denial of equal protection and due process to H.P. Guerra renders void the taking of his oil and gas estate.

17. In its Motion to Dismiss, the Government argues that the condemnation of H.P. Guerra's property was done regularly, according to law, and that the final judgment entered November 14, 1995, confirming the taking of all rights, titles and interests of H.P. Guerra in the subject properties precludes the Plaintiffs from re-urging their Constitutional claims. The Government alleges that the Plaintiffs' suit was not

filed within the twelve-year limitations period of 28 U.S.C. § 2409a(g) and is time-barred.

Conclusions of Law

1. This Court has jurisdiction under 28 U.S.C. §§ 1331, 2409a, 1346(f) and Rule 60b(4), (5) and (6), Fed. R.Civ.P.

2. The standard to be applied in deciding a motion for summary judgment is found in Fed.R.Civ.P. 56(c):

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

See also, Celotex Corp. v. Catrett, 477 U.S. 316, 325, 106 S.Ct. 2548, 2554, 91 L.Ed 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.4, 91 L.Ed 2d 202, 212-213 (1986); Fields v. City of South Houston, Texas, 922 F.2d 1183, 1187 (5th Cr. 1991); Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990), reh. den. 920 F.2d 259 (5th Cir. 1990).

3. Summary judgment motions permit the court to resolve lawsuits without the necessity of trials if there is no genuine dispute as to facts which are material

and the moving party is entitled to judgment as a matter of law. Fields, supra, 922 F.2d at 1187; Lavespere, supra, 910 F.2d at 177-178; Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 79 (5th Cir. 1987).

4. Plaintiffs' Summary Judgment evidence is almost entirely comprised of documents correspondence and instruments discovered in Government files and records maintained by the International Boundary & Water Commission and by the United States District Clerk. Additionally, Plaintiffs have offered the sworn affidavits of Messrs. Jean N. Beuerle, C.E. Kimmell and W.T. Guerra. The United States has not responded with factual evidence to controvert Plaintiffs' Summary Judgment proof. Plaintiffs' evidence must, therefore, be taken as true. Adickes v. S.H. Kress Co., 398 U.S. 144, 161, 90 S.Ct. 1598, 26 L.Ed 2d 142, 156 (1970).

5. It is undisputed that:

(a) The Secretary of State and the Commission of the International Boundary & Water Commission formulated a policy to be followed in the Falcon Project that landowners would be offered the option to retain their oil and gas rights provided no drilling could be conducted within the water storage reservoir.

(b) This policy was concealed from H.P. Guerra, even though he protested the taking of his oil and gas estate.

(c) The Government took the 472.48-acre upland tract it never used, sold it to the State of Texas for a use not authorized by the statute empowering it to take lands "necessary" for the Falcon Project, and retained the oil and gas estate, notwithstanding its admission on record that it did not require for the public project the oil and gas estate in the 90.67-acre tract comprising the northerly part of the 563.15-acre park tract.

(d) The Government maintained at all times to H.P. Guerra and later to his heirs that it required ownership of the oil and gas estate in and under the lands acquired from him in order to prohibit drilling operations on these lands.

(e) The GUERRA HEIRS observed in 1992 the conduct of drilling operations on the lands taken from H.P. Guerra which the Government had advised in 1981 could never be drilled or explored for oil and gas.

(f) The Government systematically followed its policy announced to the owners in Zapata County, and permitted the owners in that County to retain their oil and gas rights subject to perpetual non-drilling easement in areas below 307 feet above sea level.

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6. The Twelve-year Statute of Limitations of 28 U.S.C. § 2409a(g) should not bar the GUERRA HEIRS'

claim. The Government concealed from H.P. Guerra its policy which, if known by him, would have afforded him the option to retain his oil and gas estate. Equity requires that the Government be estopped from asserting the 12-year limitations statute as a bar to Plaintiffs' claim. Rhodes v. Guiberson Oil Tools Division, 927 F.2d 876, 878-869 (5th Cir. 1991).

7. The statute of limitations in 28 U.S.C. 5 2409a(g) is not an absolute jurisdictional limitation. It is subject to the principles of equitable estoppel and equitable tolling. Fadem v. United States, 52 F.3d 202, 205 (9th Cir. 1995, writ of cert. pending); Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96, 112 L.Ed 2d 435, 444 (1990).

8. The Fadem decision follows the holding of the United States Supreme Court in Irwin v. Department of Veterans Affairs, 498 U.S. 89, 111, S.Ct. 453, 112 L.Ed 2d 435 (1990). Irwin, tried in the United States District Court, Western District of Texas, reverses the judgment of the trial court, and the affirmation of that judgment by the Court of Appeals, Fifth Circuit, that the 30-day period provided in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., within which a claimant can file a civil action absolutely limits the court's jurisdiction. The Supreme Court considered in Irwin whether late-filed claims are jurisdictionally barred. It concluded that they are not.

9. In Irwin, the Supreme Court compared the language of the limitations statute in 42 U.S.C. § 2000e-16(c),

that, "within thirty days . . . an employee . . . may file a civil action. . ."; with the limitations statute reviewed earlier by the court in Soriano v. United States, 352 U.S. 270, 1 L.Ed 2d 306, 77 S.Ct. 269 (1957); "every claim . . . shall be barred unless the petition . . . is filed within six years. . ." (Note that this language is almost identical to § 2409a(g)). This comparison led the Court to reason, "We are not persuaded that the difference between them is enough to manifest a different congressional intent with respect to availability of equitable tolling", Irwin, 112 L.Ed 435, 443). The court added, "We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government". Id.

10. In Rhodes, supra at 927 F.2d 878-879, Justice Jere S. Williams identifies an application of the doctrine of equitable estoppel to a defense that a limitations statute time-bars a plaintiffs" claim: "Under equitable estoppel, an employer is estopped from asserting the filing period if the employer misrepresented or concealed 'facts necessary to support a discrimination charge'", citing Pruet Prod. Co. v. Ayles, 784 F.2d 1275, 1280 (5th Cir. 1986).

11. H.P. Guerra, deprived by the Government of the knowledge of its policy affording owners the option to retain their oil and gas estates, was helpless to challenge the Government's claim that it required his oil and gas estate. Berman v. Parker, 348 U.S. 26, 35, 75 S.Ct. 98, 99 L.Ed 27, 39 (1954); United States

v. 2,606.84 Acre of Land, 432 F.2d 1286, 1289 (5th Cir. 1970).

12. Only when the Governments's claim for requiring H.P. Guerra's oil and gas estate was shown to have been for a private commercial purpose, and not to prohibit drilling, did the Plaintiffs have a justiciable cause of action. 7 Nichols Law or Eminent Domain, "The Public Use", § 7.01[6].

13. The Government's expansion of its claim to H.P. Guerra's oil and gas estate, from requiring it only in order to prohibit possible subsidence and resulting damage to this dam, to the open use by exploitation and production of it for commercial profit, presented the GUERRA HEIRS for the first time evidence of the wrongful taking. Werner v. United States, 9 F.3d 1514, 1549 (11th Cir. 1993).

14. That the GUERRA HEIRS knew of the disparate advantage afforded by the Government to their neighbors in Zapata County, without the knowledge that such different treatment was accorded by a general policy of taking which was concealed from them, would not reasonably alert them to suspect that the Government had wrongfully concealed its policy. Only knowledge of the policy opened to the GUERRAS HEIRS their right to invoke the policy and elect to retain their oil and gas estate. The concealment of that policy estops the Government from asserting as a defense the twelve-year statute. Rhodes, supra.

15. The concealment from H.P. Guerra of the Government's policy of taking at Falcon denied him due process of law. The judgment of taking of his oil and gas estate, procured by the concealment of this policy, is void. Bass v. Hoagland, 172 F.2d 205, 209 (5th Cir. 1949) cert. denied, 338 U.S. 816, 70 S.Ct. 57, 94 L.Ed 494 (1949); Federal Practice and Procedure, Wright and Miller, "Void Judgment", § 2862, pages 198-200; Nicholas on Eminent Domain, Vol. 1A, § 4.7, "Due Process Requires a Taking for Public Use", pages 4-38.

Because of the foregoing, this Court respectfully recommends that Government's Motion to Dismiss be DENIED and the Plaintiff's Motion for Summary Judgment be GRANTED.

The Clerk shall send copies of this Report and Recommendation to the parties who have ten (10) days from receipt thereof to file written objections hereto, pursuant to General Order 80-5. Failure to file written objections within the prescribed time shall bar an aggrieved party from attacking the factual findings on appeal.

DONE at Brownsville, Texas, this 24th day of July.

/s/_____
Fidencio G. Garza, Jr.
United States Magistrate Judge

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment V

Due Process of Law and Public Purpose Clauses

No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

Quiet Title Act, 28 U.S.C. § 2409a

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest. . . .

. . .

(g) Any civil action under this section, . . . shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

Declaration of Taking Act, 40 U.S.C. 258a , et. seq.

§ 258a. Lands, easements, or rights of way for public use; taking of possession and title in advance of final judgment; authority; procedure

. . . [T]he petitioner may file in the cause . . . a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States . . . .

. . .

Upon the filing [of a] declaration of taking and of the deposit in the court . . . of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute . . . shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto;. . . .

§ 258f. Exclusion of certain property by stipulation of Attorney General

In any condemnation proceeding instituted by or on behalf of the Untied States, the Attorney General is authorized to stipulate or agree in behalf of the United States to exclude any property or any part thereof, or any interest therein, that my have been, or may be, taken by or on behalf of the United States by declaration of taking or otherwise.

Federal Rules of Civil Procedure

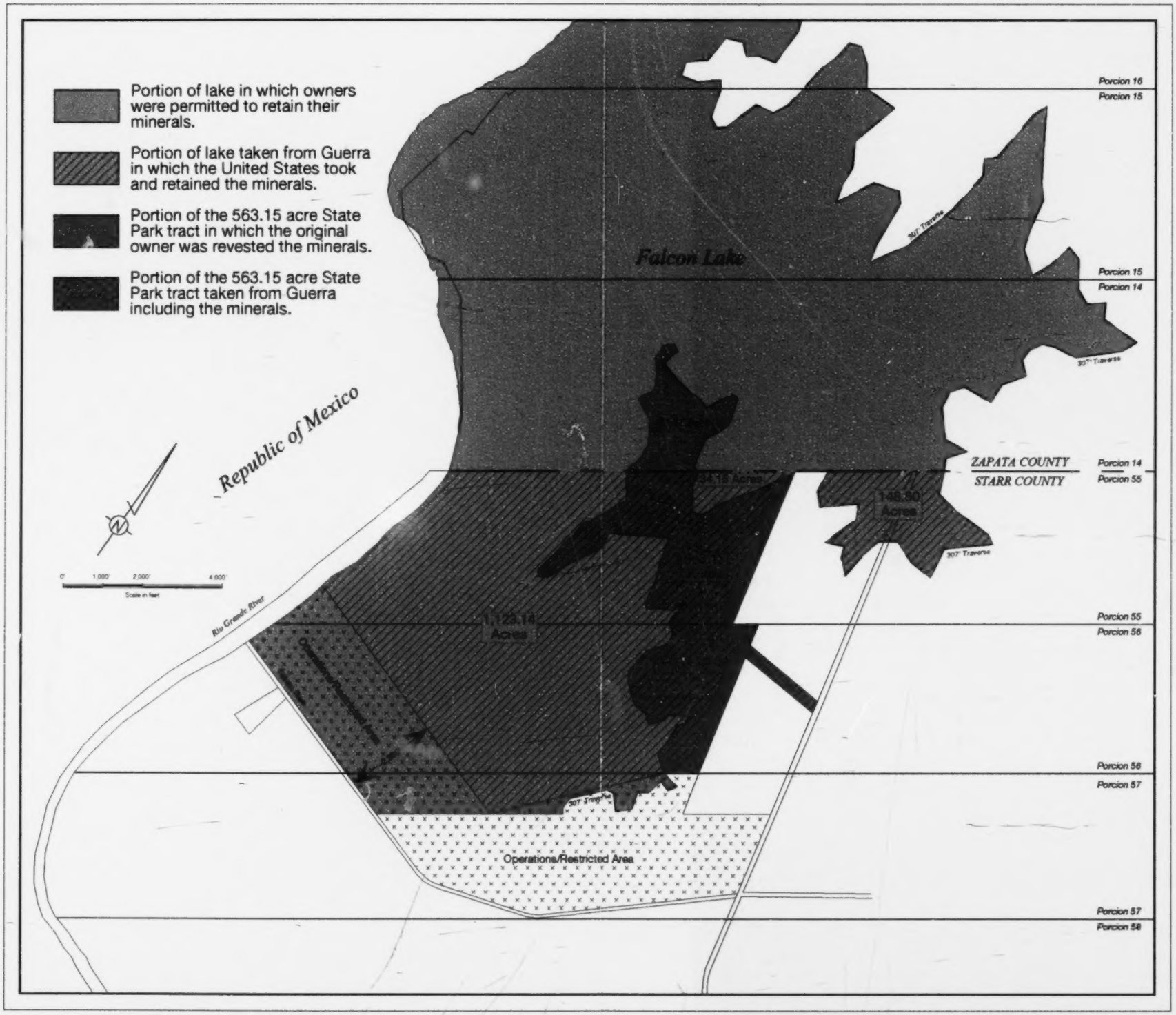
RULE 60. RELIEF FROM JUDGMENT OR ORDER

. . .

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence, Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding . . . for the following reasons: . . . (4) the judgment is void; . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . [T]he procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by independent action.

APPENDIX H

MAP OF GUERRA'S CONDEMNED LANDS


Portion of lake in which owners were permitted to retain their minerals.
Portion of lake taken from Guerra in which the United States took and retained the minerals.
Portion of the 563.15 acre State Park tract in which the original owner was revested the minerals.
Portion of the 563.15 acre State Park tract taken from Guerra including the minerals.
Falcon Lake
Republic of Mexico
Rio Grande River
ZAPATA COUNTY
STARR COUNTY
34.15 Acres
148.30 Acres
1,123.14 Acres
307' Traverse
Operations/Restricted Area
Porcion 16
Porcion 15
Porcion 15
Porcion 14
Porcion 14
Porcion 55
Porcion 55
Porcion 56
Porcion 56
Porcion 57
Porcion 57
Porcion 58
0'
1,000'
2,000'
4,000'
Scale in feet